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NO. 85-1533 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BRENDA DAVIS,
CYNTHIA JAYNE DURBIN,
AND THE CLASS,
Petitioners,

v.

CITY OF DALLAS, AND CHIEF,
DALLAS POLICE DEPARTMENT,
Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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21 pp

QUESTION PRESENTED

Whether the circuit court is correct in holding that *Spurlock v. United Airlines, Inc.* enunciates the standard which should be followed in determining the job relatedness of a 45 hour college credit requirement for police officer applicants, because the context of jobs with high public risk and responsibility is distinctively different from the context of the industrial jobs examined in *Griggs v. Duke Power Co.* and *Albemarle Paper Co. v. Moody.*

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On Petition for Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

Brief of Respondents in Opposition To Petition For Writ of Certiorari

STATEMENT OF THE CASE

This action is an employment discrimination, disparate impact case, brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e—17. Petitioners seek review of the circuit court's decision upholding the district court's refusal to enjoin the Dallas Police Department from

applying three employment criteria to police officer applicants. Petitioners presently dispute only the criteria that "an applicant, at the time of application, must have 45 semester hours of college credit, with at least a "C" average, from an accredited college or university."

This case began in June, 1976, when Brenda Davis filed a lawsuit based upon Title VII. Ms. Davis, who was rejected for employment as a Dallas police officer because she falsified her employment application, claimed that she was discriminated against because of her race and sex.

Cynthia Durbin, discharged by the Dallas Police Department for unsatisfactory performance during field training, filed a similar lawsuit, claiming sex discrimination. The two lawsuits were consolidated for discovery purposes in July, 1977.

The two cases were certified as a class action in July, 1978. The court named Davis and Durbin representatives of all Blacks and females who had been denied permanent employment with the Dallas Police Department from August 1, 1973 to date. The cases were consolidated for all purposes on September 21, 1979.

After a trial on liability in September, 1979, the district court [Judge Patrick Higginbotham] held that the City of Dallas had not discriminated against women, but, by the use of certain employment criteria, had discriminated against Blacks in its hiring of police officers. *Davis v. City of Dallas*, 483 F.Supp. 54, 59 and 62 (N.D. Tex. 1979).

In March, 1980, the district court declined to reconsider liability and ordered a hearing on injunctive relief, at which the City could present validation evidence. *Davis v. City of Dallas*, 487 F.Supp. 389 (N.D. Tex. 1980). [Petitioners contended below that only validation evidence developed by

LWFW Associates, a consulting firm which the City retained, could be presented at the injunctive hearing. The district court's order shows no such limitation on the evidentiary scope of the injunctive hearing].

Petitioners applied for injunctive relief on June 19, 1981 and on September 29, 1982. In April, 1983, the district court [Judge Robert Porter] held an evidentiary hearing on the request for injunctive relief. The issue, among others, was whether the 45 hours of college credit requirement was job related. The City stipulated that the college credit requirement had a statistically significant disparate impact on Black police officer applicants.

Based on evidence presented at the injunctive hearing, the district court found that the college credit requirement was job related and denied injunctive relief. The circuit court affirmed that decision. *Davis v. City of Dallas*, 777 F.2d 205 (5th Cir. 1985).

Applicants for police officer positions with the Dallas Police Department must successfully complete a four-step process, lasting approximately 95 weeks, before they are permanently hired. The process includes initial hiring, academy training, field training, and probation. Only the initial hiring phase is at issue here.

The hiring phase of the process includes several steps:

1) initial application;
2) preliminary interview;
3) psychological testing;
4) medical and physical fitness examinations;
5) background investigation;
6) polygraph examination; and
7) applicant interview board.

Applicants may be eliminated at any stage of the process at which they are disqualified.

The police department uses a standard list of employment criteria to determine applicants' eligibility. The list includes categories relating to general matters, criminal activity, sexual conduct, drug usage, traffic violations, prior police employment, and general employment. Each category contains a specific list of employment criteria. The college credit requirement is one of those criteria.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because the important federal question of the standard for proving job relatedness in Title VII cases has already been addressed by this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), and the Fifth Circuit's opinion does not conflict with those decisions. Rather, the Fifth Circuit has logically extended the *Griggs/Albemarle* rules to fit the context of this case. Additionally, there is no conflict between the Fifth Circuit's opinion and that of any other circuit court which has addressed the specific issue. Finally, certiorari should be denied because the Fifth Circuit has rendered a clear, logical, well-reasoned decision which adequately disposes of the issue and establishes a workable standard for determining job relatedness of a college credit requirement for police officer applicants.

ARGUMENT AND AUTHORITIES

I. THE FIFTH CIRCUIT'S OPINION EXTENDS THE RULES OF *GRIGGS* AND *ALBEMARLE* TO FIT THE CONTEXT OF THIS CASE.

The rules regarding job relatedness were established in *Griggs v. Duke Power Co., supra* and *Albemarle Paper Co. v. Moody, supra.* The rules are that if an employee selection

requirement adversely impacts a protected racial group — in this case, Blacks — the employer must show that the device is job related; that is, the requirement "... must have a manifest relationship to the employment in question." *Griggs, supra* at 432. Moreover, the relationship must be proven by "professionally acceptable methods." *Albemarle, supra* at 431.

The Fifth Circuit has followed the *Griggs/Albemarle* rules in its examination of adverse impact/job related cases in industrial settings. The principal Fifth Circuit cases on those issues are *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974), *appeal after remand*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); and *Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir. 1976), *cert. denied*, 429 U.S. 861 (1976). The question presented by this case is, however, distinguishable from all of these cases, as the Fifth Circuit observed in its opinion:

> In each of the foregoing decisions by this Court, we examined educational requirements in the context of skilled labor positions which involved relatively readily definable tasks and abilities, and did not involve unusual dangers or responsibilities to the public at large. Some scholars have distinguished our analysis on the basis of the type of job position that was at issue. See e.g., Gwartney, Asher, Haworth & Haworth, *Statistics, the Law and Title VII: An Economist's View*, 54 Notre Dame Law, 633, 645 (1979) ("The inference of the Fifth Circuit's reasoning [in James] is that individuals with, say, a primary school education, are of equivalent value with other employees who have completed high school — *at least for an industrial employer hiring blue-collar workers.*" 777 F.2d at 211 n.5 (emphasis in original).

The Fifth Circuit's comment precisely states the distinction between job relatedness of employment criteria for industrial positions and job relatedness of employment criteria for police officer applicants. The facts and the contexts of the two situations are vastly different, and thus, require different evidentiary standards.

In *Albemarle,* this Court said

> The concept of job relatedness takes on meaning from the facts of the *Griggs* case.
>
> . . .
>
> The question of job relatedness must be viewed in the *context* of the plant's operation [*Albemarle*] and the history of the testing program. *Albemarle, supra* at 426-427 (emphasis added).

The context of *Griggs* was a power-generating facility. The tasks involved were in departments identified as labor, coal handling, operations, maintenance, and laboratory and test. 401 U.S. at 426-27. The context of *Albemarle* was a plant which converted raw wood into paper products and employed about 650 people. 422 U.S. at 427.

In *Griggs* and *Albemarle,* as in the Fifth Circuit cases, the companies' purposes and the tasks to be accomplished related to industry. That is significantly different than the purpose of a large, metropolitan police department and the tasks of today's police officer. Moreover, the diploma requirements of the industrial cases were intended to measure significantly different skills than those measured by the college credit requirement of the Dallas Police Department. In this case, the district court found that a police officer must have "... individual judgment, ability to intervene in volatile situations (i.e. domestic quarrels), ability to make important decisions, and ... [ability to serve] as a witness in

Court." Petitioner's Appendix B at 4b. Those qualities are the ones measured by higher education, not simply the ability to read and comprehend at a certain level or to be an accomplished painter or bricklayer.

Police officers are not industrial workers learning a trade or practicing a craft under controlled conditions. They are men and women entrusted by society with responsibility for life and property in volatile situations, which may vary from moment to moment. The critical [essential] question about a police applicant is, as the trial court said, his or her "... ability to handle tough situations with a gun." Petitioner's Appendix B at 5b. The amount of education necessary for that ability has been neither raised nor answered by previous job relatedness cases. Therefore, to argue, as Petitioners do, that prior case law conclusively determines the issue in this case is to ignore the "facts and context" requirements of *Griggs* and *Albemarle*.

The circuit court has logically applied this Court's *Griggs/Albemarle* reasoning in the context of an urban police department. This Court should not be obligated to redetermine *Griggs* and *Albemarle* each time facts and context change.

II. THE FIFTH CIRCUIT IS THE FIRST COURT WHICH HAS DIRECTLY ADDRESSED THE ISSUE OF COLLEGE EDUCATION FOR POLICE OFFICER APPLICANTS IN A MAJOR METROPOLITAN AREA; THEREFORE, THERE IS NO CONFLICT AMONG CIRCUITS ON THIS ISSUE.

Several circuit courts have spoken to the issue of written examinations for police officer applicants or other professional positions, but none has directly addressed the question of college education. *See, e.g., Guardians Ass'n v. Civil Serv. Comm'n*, 633 F.2d 232 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981) (written test); *Kirkland v. Department of Correctional Serv.*, 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976) (civil service promotional examination); *United States v. Virginia*, 620 F.2d 1018 (4th Cir. 1980), *cert. denied*, 449 U.S. 1021 (1980) (written test); *Williams v. Vukovick*, 720 F.2d 909 (6th Cir. 1983) (written, promotional examination); *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977), *cert. denied sub nom., Arado v. United States*, 434 U.S. 875 (1977) (promotional examination); *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980) (height requirement and physical agility test) (*Blake* standard of proof modified by *Contreras*); *Contreras v. City of Los Angeles*, 656 F.2d 1267 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982) (civil service auditors' examination).

Some courts have struggled with the issue of validating educational requirements in professional situations. Those courts' discussions or decisions support the Fifth Circuit's position that educational requirements, as applied to police officer applicants, must be examined from a different perspective than current precedent and that case law must be extended to fit professional employment contexts such as police departments. The rule of law in such situations

should be that job relatedness may be esta' 'ished by expert testimony based upon meaningful predictive studies. Cases supporting that position are *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972); *Spurlock v. United Airlines, Inc.*, 475 F.2d 216 (10th Cir. 1972); *Rice v. City of St. Louis*, 464 F.Supp. 138 (E.D. Mo. 1978), *aff'd*, 607 F.2d 791 (8th Cir. 1979); *Arnold v. Ballard*, 390 F.Supp. 723 (N.D. Ohio 1975); *League of United Latin American Citizens v. City of Santa Ana*, 410 F.Supp. 873 (C.D. Cal. 1976); *United States v. City of Buffalo*, 457 F.Supp. 612 (W.D. N.Y. 1978), *modified on other grounds and aff'd*, 633 F.2d 643 (2d Cir. 1980) (per curiam); *Vuyanich v. Republic National Bank of Dallas*, 505 F.Supp. 224 (N.D. Tex. 1980), *judgment vacated and remanded*, 723 F.2d 1195 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 567, 83 L. Ed.2d 507 (1984). *See also Aguilera v. Cook County Police & Corrections Merit Bd.*, 582 F.Supp. 1053 (N.D. Ill. 1984); *aff'd*, 760 F.2d 844 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 237, 88 L.Ed.2d 238 (1985).

In this case, the Fifth Circuit adopts the standard of *Spurlock v. United Airlines, supra.* In *Spurlock*, the Tenth Circuit, upholding a college degree requirement for airline pilots on the testimony of company officials, said

> When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminates against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job-related. On the other hand, *when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great*, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related. Cf. 29 C.F.R. § 1607. 5(c)(2)(iii). 475 F.2d at 219 (emphasis added).

The economic and human risks involved in hiring an unqualified police officer applicant are of the greatest degree. College education develops judgment, maturity, flexibility, and other intangible, but essential, characteristics for work of high risk and responsibility.

Petitioners contend that the Fifth Circuit expressly disapproved *Spurlock* in *Watkins v. Scott Paper, supra.* That contention fails upon a careful reading of the *Watkins* decision.

The Fifth Circuit did criticize *Spurlock* in *Watkins, supra* at 1182 n. 32. The criticism was, however, not directed at the "high risk" language. Rather, the court said "[t]o the extent that these cases [*Spurlock* and *Castro*] vary from our analysis of Scott's *diploma requirements,* we find them unpersuasive." *Id.* (emphasis added).

The Fifth Circuit said that Scott Paper company's high school diploma requirement did not necessarily show an ability to reach a certain level of achievement on the job. *Spurlock,* on the other hand, said that a certain educational achievement — attainment of a college degree — did reflect the ability to attain a certain level of job performance. That different conclusion seems to be what the Fifth Circuit found "unpersuasive."

The Eighth Circuit, in *Rice v. City of St. Louis, supra,* approved a college degree requirement for Public Health Program Representatives — persons who interacted with the public on health-related matters. The circuit court approved the district court's statement that "[t]he relative function of the academic prerequisites to job relatedness varies inversely with the risks to the health and safety of the public who depend upon the technology." 464 F.Supp. at 142.

The circuit court said that the tasks of Program Representatives were "difficult and taxing," and

> The performance of those tasks in a satisfactory manner requires maturity, 'unshockability,' persistence and tact;
>
> . . .
>
> Likewise there is some risk to the public health and safety in the employment of unqualified representatives. *Cf.* 29 C.F.R. § 1607.5(c)(2). 607 F.2d at 797.

A police officer's responsibilities for the public's health and safety are considerably greater than the responsibilities discussed in *Rice.*

The other cases cited above likewise support the proposition of a lighter standard of proof for professional positions and for educational requirements for police officer applicants. Each of those cases is discussed in the Fifth Circuit's opinion in this case. 777 F.2d 205 (5th Cir. 1985).

The sole case in which there is an arguable conflict with the Fifth Circuit's opinion is *Contreras v. City of Los Angeles, supra.* In that case, the Ninth Circuit held

> . . . that discriminating tests are impermissible unless shown by professionally accepted methods to be predictive of or significantly correlated with important elements of work behavior that comprise or are relevant to the job or jobs for which candidates are being evaluated. 656 F.2d at 1280.

The *Contreras* court relied upon validation methods set out in EEOC Guidelines. The court said

> These standards [EEOC Guidelines] are not mandatory, but they are 'entitled to great deference' [citation omitted] and an employer who disregards them must articulate some cogent reason for doing so and *generally* bears a heavier than usual burden of proving job relatedness. 656 F.2d at 1281 (emphasis added).

Upon first reading, there may appear to be a conflict between the *Contreras* language and the Fifth Circuit's opinion. More careful examination, however, shows clearly that there is no true conflict, for two reasons:

(1) *Contreras* concerns employment criteria for auditors, working in a controlled, office environment, with no high risk to public health and safety.

(2) The *Contreras* court, in discussing an employer's burden of proof, in the court's own words, is speaking only in *general* terms. There is no indication that the court intends for its generalization to apply to characteristics "... far less susceptible to precise definition and to identification and quantification in individual cases." [Quoted language from *Davis v. City of Dallas*, 777 F.2d at 216].

III. THE FIFTH CIRCUIT'S OPINION IS WELL-REASONED AND ESTABLISHES A CREDIBLE, WORKABLE STANDARD

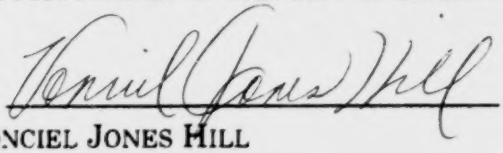
The circuit court very carefully analyzed prior case law on job relatedness. The court's rationale for its decision is logical and reasonable. Therefore, the decision should not be reviewed.

CONCLUSION

For the above reasons, Respondents respectfully pray that this Court deny the Writ of Certiorari.

Respectfully submitted,

CITY ATTORNEY OF THE CITY OF DALLAS

By 

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CERTIFICATE OF SERVICE

Respondents, by and through their Attorney of Record, hereby certify that in accordance with Supreme Court Rule 28, paragraph .3, three copies of their Brief In Opposition have been served upon Petitioners, by and through their Attorney of Record, Kenneth H. Molberg, Wilson, Williams & Molberg, 2214 Main Street, Dallas, Texas 75201-4324, by first class mail, this 24th day of April, 1986.

Vonciel Jones Hill

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